# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>LORIN DWAYNE JONES, aka LORIN DWAINE JONES,<br><br>Appellant. | No. 32680-9-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

VAN DEREN, A.C.J. — Lorin D. Jones appeals his convictions for (1) possession of a controlled substance—methamphetamine; and (2) driving without a license and no valid identification. Jones argues that his trial counsel was ineffective because he (1) stipulated to the admissibility of five prior convictions and advised Jones not to testify based on that stipulation; (2) failed to object to portions of an officer's testimony and to portions of the State's closing argument; and (3) failed to propose an "unwitting possession" jury instruction. We disagree and affirm.

## I. FACTS

While on routine patrol at about 2 a.m. on September 20, 2004, Vancouver police officer, Robert O'Meara, stopped a vehicle after it turned without activating its turn signal. The driver of

the vehicle, Lorin D. Jones, failed to produce a driver's license, registration, and insurance information but identified himself verbally. When asked if the vehicle was his, Jones responded, "Yes, it's my girlfriend's." 2 Report of Proceedings (RP) at 69. A records check revealed that Jones did not have a driver's license and that the vehicle was registered to a third party, not Jones or his girlfriend. O'Meara arrested Jones for driving without a license and searched the vehicle incident to Jones' arrest. O'Meara discovered a glass vial containing methamphetamine under the driver's seat.

The State charged Jones with "possession of a controlled substance-methamphetamine" and "driving without license and no valid identification."[1] Clerk's Papers (CP) at 3. During pre-trial motions, the State sought permission to introduce five prior convictions[2] either while cross-examining Jones if he testified or if Jones elicited self-serving hearsay testimony from O'Meara. All five convictions were for crimes of dishonesty but only the misdemeanor theft conviction was less than ten years old.

The State argued that even though four of the convictions were over ten years old, they should be admitted to impeach Jones' credibility because "the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."[3] 2 RP at 4-5. Jones' attorney did not

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[1] *See* RCW 69.50.4013(1) and RCW 46.20.005.

[2] (1) Misdemeanor third degree theft (1996); (2) second degree robbery (1990); (3) second degree possession of stolen property (3 convictions in 1990). The parties do not seem to dispute the existence of the theft conviction. But the theft conviction does not appear in Jones' judgment and sentence.

[3] To admit a conviction over ten years old, Evidence Rule (ER) 609 requires that the trial court determine that the probative value of the convictions *substantially* outweighs their prejudicial effect, not that the probative value merely outweighs their prejudicial effect by any amount. Thus,

object, responding, "Your Honor, I would not put the defendant on the stand. I realize that if the defendant does take the stand that he's subject to impeachment by prior conviction. And so I have no intention on putting the defendant on the stand, so we have no objection [to the admissibility of Jones' five prior convictions.]"[4] 2 RP at 5.

The trial court also engaged in extensive pre-trial discussion with both Jones' attorney and the State concerning exculpatory statements Jones made to O'Meara after his arrest. The exculpatory statements were Jones' (1) denial that the methamphetamine discovered under the driver's seat of the vehicle was his; and (2) claim that "a lot of people" drive the truck he was driving at the time of the traffic stop. The State argued that the statements were inadmissible hearsay if Jones' attorney elicited them from O'Meara because the State would not have an opportunity to cross-examine Jones regarding the statements. Although Jones' defense attorney initially disagreed with the State's analysis of the issue, he ultimately stipulated to the inadmissibility of the exculpatory statements if he elicited them from O'Meara without providing the State an opportunity to cross-examine Jones.

During trial, O'Meara testified that after he activated his lights to initiate the traffic stop,

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for precision's sake, it appears the State recited an inaccurate legal standard to the trial court.

[4] Before presentation of the State's case, the trial court advised Jones that he could, but need not, testify if he so wished, but that if he testified, he would be subject to cross-examination regarding both post-arrest exculpatory statements and his credibility. Jones understood the consequences if he testified. Further, after the State rested its case and after Jones' attorney explained to the court that Jones would not testify given "his prior criminal record and impeachment by prior conviction," the court asked Jones whether he had an opportunity to discuss the issue with his attorney. 2 RP at 74. Jones stated that he did discuss the matter with his attorney and that he was choosing not to testify.

he observed a lot of "furtive movement" in the car, "which is basically suspicious movement that you wouldn't normally expect given the certain circumstances." 2 RP at 56. When the State asked him to elaborate on what he meant by furtive movement, O'Meara continued: "Normally if I initiate a traffic stop, you know, normally somebody will pull to the side of the road. When I say furtive movement, I noticed a lot of ducking down, a lot of looking left and right, which again is not normal for, you know, your normal citizen." 2 RP at 57. O'Meara noted that he had seen movement like this many times when making traffic stops, and the following exchange occurred:

> Q. And in your -- in your prior experience and during the course of employment when you've seen this type of movement, what has -- what has been the result?
>
> A. Generally when people make movements such as that, what I call furtive movement, they're either trying to hide drugs or weapons, or they may possibly be looking for -- looking for escape routes. They may have a warrant. Again, it's suspicious in nature given, you know, what a normal person or citizen would do.
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> Q. So when you observed this, when you observed this type of movement inside defendant's vehicle, what did that mean to you?
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> [Defense Attorney]: Objection, Your Honor, relevance.
>
> The Court: Response.
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> [The State]: Your Honor, we're -- we're -- we're -- we're talking about the furtive movement, and basically we're trying to establish what was going through the officer's mind at that particular time as to when he observed the movement.
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> The Court: I'll allow it as a present-sense impression.

2 RP at 57-58.

After O'Meara testified, the State rested and the parties discussed jury instructions. Asserting that possession of a controlled substance does not require proof of knowledge or intent, the State proposed that knowledge and intent instructions be applied only to the driving without a

license charge. Jones' attorney responded, "We are aware that there is no culpable mental state for possession, and I don't know of any instruction either, Your Honor." 2 RP at 77. The judge expressed that he knew of no instruction limiting the State's proposed knowledge and intent instructions to the driving without a license charge only, and that the parties should therefore argue to the jury the knowledge and intent instructions as they felt appropriate. Jones' attorney proposed no unwitting possession instruction to the jury. The jury found Jones guilty on both charges.

Jones appeals.

## II. ANALYSIS

### A. Ineffective Assistance of Counsel

Jones argues that he is entitled to a new trial because his trial counsel's (1) stipulation to the admissibility of five prior convictions and subsequent advice not to testify based on that stipulation; (2) failure to object to portions of O'Meara's testimony and the State's closing argument; and (3) failure to propose an unwitting possession jury instruction, constituted ineffective assistance of counsel.

The State responds that Jones had to testify in order to preserve any error in the trial court's admission of the prior convictions.[5] The State also argues that any advice to Jones about

[5] The State relies on *State v. Brown*, 113 Wn.2d 520, 540, 782 P.2d 1013 (1989), for its contention. In that case, our Supreme Court held that a defendant must testify in order to preserve alleged error in a ruling admitting a prior conviction. *Brown*, 113 Wn.2d at 540. But Jones is not challenging the trial court's ruling admitting his convictions over ten years old; indeed, the trial court never ruled on their admission. Rather, Jones is asserting that his attorney should not have stipulated to their admission. Thus, the *Brown* rule is inapplicable here because we evaluate Jones' attorney's effectiveness, not the trial court's purported ruling on the admissibility of Jones' prior convictions.

testifying was not ineffective assistance because the decision about testifying was ultimately

Jones' choice and there could be a number of reasons why Jones would choose not to testify. The State contends that O'Meara's testimony was based on his experience as an officer and was not directed specifically at Jones; thus, Jones' attorney had no reason to object.[6] Finally, the State contends that there would have been no factual basis to support an unwitting possession instruction.

1. Standard of Review

Effective assistance of counsel is guaranteed under the federal and state constitutions. *See* U.S. Const. amend. VI; Wash. Const. art. I, § 22. To prove ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) that deficient performance prejudiced him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *Woods*, 154 Wn.2d at 421. We afford great deference to trial counsel's performance and begin our analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

2. Jones' Prior Convictions

Evidence Rule 609(a) carves a narrow exception to the general rule that prior convictions are generally inadmissible against a defendant because they are irrelevant to the question of guilt

[6] The State did not respond to Jones' allegation that his trial counsel failed to object to portions of the State's closing argument.

and are very prejudicial, shifting the jury's focus from the merits of the charge to the defendant's general propensity for criminality. *State v. Hardy*, 133 Wn.2d 701, 706, 710, 946 P.2d 1175 (1997). Under ER 609(a), for the purposes of attacking the credibility of a testifying defendant in a criminal case, evidence that the defendant has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year, and the court determines that the probative value of admitting the evidence outweighs the prejudice to the defendant against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of punishment. ER 609(a); *Hardy*, 133 Wn.2d at 706-07.

Prior convictions involving dishonesty and false statements that are under 10 years old are automatically admissible under ER 609(a)(2). *State v. Russell*, 104 Wn. App. 422, 434, 16 P.3d 664 (2001). But if a conviction is over ten years old, it is admissible only if the court determines that the conviction's probative value supported by specific facts and circumstances substantially outweighs its prejudicial effect. ER 609(b); *Russell*, 104 Wn. App. at 433. Washington trial courts must make this determination after balancing a conviction's probative value against its prejudicial effect on the record, even if the conviction involved a crime of dishonesty or false statement. *Russell*, 104 Wn. App. at 433-34.

Here, the trial court did not balance the probative value of Jones' prior convictions against their prejudicial effect because Jones' attorney stipulated to their admission if Jones testified. Jones now argues that this stipulation and his trial counsel's subsequent advice not to testify constituted ineffective assistance of counsel.

Jones fails to recognize tactical reasons for the stipulation and advice. For example, Jones would have benefited minimally, if at all, had he testified. The only exculpatory testimony Jones could have provided that his attorney had not already elicited from O'Meara were his post-arrest statements that the methamphetamine was not his and that "a lot of people" drive the truck Jones was driving at the time of the traffic stop. Neither statement was particularly probative given (1) Jones' choice to have a jury trial in the first instance—indeed, a trial would not have been necessary had Jones admitted that the methamphetamine was his; and (2) Jones' attorney's ability to establish through O'Meara that the truck was not Jones'. There appears little reason for Jones to further testify that the truck was not his when that fact had already been established. Moreover, by advising Jones not to testify, his attorney shielded Jones from admitting the misdemeanor theft conviction.

The risk that Jones' aging prior convictions might be revealed to the jury on cross-examination[7] (in addition to the automatically admissible theft conviction) far outweighed any benefit that may have resulted from Jones' limited testimony. When his attorney stipulated to the admissibility of his prior convictions, the attorney likely knew that any exculpatory testimony could be established through other testimony without risking exposure of the prior convictions. Thus, there was little motivation for Jones' attorney to require a ruling on the admissibility of the convictions and his decision to stipulate to their admissibility was not objectively unreasonable.

Further, it is hard to envision what prejudice Jones suffered from his attorney's stipulation.

[7] Even if Jones' attorney objected to the admission of the convictions, there is a reasonable likelihood that the trial court would have admitted them after conducting the required on-record balancing.

First, the jury never learned of his prior convictions. Second, it is unlikely that the trial's outcome would have differed had the trial court excluded his ten-plus year old convictions and had he testified; the probative value of his testimony would have been minimal and the State would have been able to introduce his misdemeanor theft conviction to attack his credibility.

3. Failure to Object

Jones argues that his trial counsel should have objected to O'Meara's testimony regarding "furtive movement" and to the State's alleged interjection of the prosecutor's personal opinion in closing argument. Specifically, Jones cites our decision in *State v. Farr-Lenzini*, 93 Wn. App. 453, 970 P.2d 313 (1999), to support his contention that O'Meara's testimony on "furtive movement" was inadmissible and that his trial counsel should have objected to it.

In *Farr-Lenzini*, the State charged Farr-Lenzini with attempting to elude a state trooper. 93 Wn. App. at 458. At trial, the State asked the trooper:

> Q: Just based on your training and experience, do you have an opinion as to what the defendant's driving pattern exhibited to you?
> A: It exhibited to me that the person driving that vehicle was attempting to get away from me and knew I was back there and refusing to stop.

*Farr-Lenzini*, 93 Wn. App. at 458.

Because it was unclear whether the trooper was testifying as an expert or lay witness, we evaluated the admissibility of his testimony under both standards. *Farr-Lenzini*, 93 Wn. App. at 460.

We determined that, although the trooper was qualified to testify as an expert on police procedures, speed, vehicle dynamics, and accident reconstruction, he was not qualified to testify as an expert on the driver's state of mind, and even if the trooper were qualified, the testimony

would not have been helpful to the jury because the jury was capable, without assistance, of drawing inferences similar to those expressed by the officer. *Farr-Lenzini*, 93 Wn. App. at 461-62.

If the trooper's testimony was offered as lay opinion testimony, we held that because Farr-Lenzini's state of mind was a core element of the offense charged, there had to be a substantial factual basis supporting the opinion. *Farr-Lenzini*, 93 Wn. App. at 462-63. We concluded that because the trooper's testimony spoke directly to Farr-Lenzini's guilt, there was an insufficient factual basis for the trooper's testimony. *Farr-Lenzini*, 93 Wn. App. at 465.

Here, as in *Farr-Lenzini*, it is not entirely clear whether O'Meara's "furtive movement" testimony was considered expert or lay opinion.[8]

Expert testimony on scientific, technical or specialized knowledge is admissible under ER 702 if (1) the proffered witness qualifies as an expert; and (2) the testimony will assist the jury understand the evidence or a fact in issue. *Farr-Lenzini*, 93 Wn. App. at 460. Practical experience is sufficient to qualify a witness as an expert. *Farr-Lenzini*, 93 Wn. App. at 461. But a police officer is not qualified to testify as an expert on a driver's state of mind. *Farr-Lenzini*, 93 Wn. App. at 461.

Like the state trooper in *Farr-Lenzini*, O'Meara's experience qualified him to testify as an expert on a variety of police-related issues, but not on Jones' state of mind as an expert witness. Unlike the trooper in *Farr-Lenzini*, however, it is debatable whether O'Meara's "furtive

[8] Because the State asked O'Meara foundational questions on his experience observing "furtive movement," it is likely that the State was eliciting O'Meara's opinion as expert testimony.

movement" testimony was about Jones' state of mind.

On one hand, it seems that O'Meara was testifying on "furtive movement" only generally--that his experience indicates that such "furtive movement" is not the typical reaction people have when subject to traffic stops and that people who exhibit "furtive movement" often possess weapons or drugs. On the other hand, it seems his testimony necessarily implies that Jones was likely hiding weapons or drugs because there was furtive movement in the vehicle when O'Meara activated his emergency lights.

A lay witness may give only those opinions or inferences that are (a) rationally based on the witness's perception and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.[9] ER 701; *Farr-Lenzini*, 93 Wn. App. at 462. And if the lay opinion relates to a core element that the State must prove, there must be a substantial factual basis supporting that opinion. *Farr-Lenzini*, 93 Wn. App. at 462-63. We also consider whether there is a rational alternative answer to the question addressed by the witness's opinion; in such a circumstance, a lay opinion poses an even greater potential for prejudice. *Farr-Lenzini*, 93 Wn. App. at 463.

Here, O'Meara's testimony related to a core element of the possession charge: testimony that Jones demonstrated "furtive movement" when O'Meara activated his emergency lights and

[9] Courts have upheld the admission of the following lay opinions: speed of a vehicle; degree of sobriety in a driving while intoxicated case; the value of one's own property; and the identification of a person from a videotape. *Farr-Lenzini*, 93 Wn. App. at 462. But courts have held the admission of other lay opinions to be improper, such as a person's mental capacity to enter into a lease and a nurse's opinion regarding a defendant's diminished capacity where the nurse lacked personal knowledge on whether the defendant was on drugs at the time of the crime. *Farr-Lenzini*, 93 Wn. App. at 462.

that such furtive movement generally means that the occupant is attempting to hide drugs or weapons. This testimony indicates O'Meara's opinion that Jones possessed drugs. But the only factual basis O'Meara had for this opinion was Jones' movement. Further, there was no rational alternative answer to the State's request that O'Meara elaborate on what he meant by "furtive movement." By definition, "furtive" means stealthy, sneaky, secretive, surreptitious, thievish, "obtained underhandedly;" the "look of those who know they ought to be doing something else." Webster's Third New International Dictionary 924 (2002). O'Meara's response inevitably equated "furtive movement" with illegal activity, namely, the possession of drugs.

But whether O'Meara's testimony spoke to Jones' state of mind is inconsequential because the testimony was not helpful to the jury. As in *Farr-Lenzini*, the jury was capable of inferring that the movement in Jones' vehicle after O'Meara activated his lights, when added to the undisputed presence of a vial of methamphetamine under the driver's seat, meant that Jones was likely attempting to hide the methamphetamine.

The admissibility of O'Meara's "furtive movement" testimony is a close issue, subject to debate. Because the issue is close, Jones' attorney's failure to object to the testimony cannot be considered objectively unreasonable, especially when Jones' attorney did, in fact, object when the State asked O'Meara what Jones' movement meant to him.

Moreover, where the defendant alleges ineffective assistance for counsel's failure to object, he must show that the objection would have been sustained and that the trial's outcome would have been different. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 909, 952 P.2d 116 (1998); *State v. Price*, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005). Here, the trial court

overruled Jones' attorney's objection to the State's direct inquiry into what Jones' "furtive movement" meant to O'Meara. Given this ruling, it is highly unlikely the trial court would have sustained an objection to O'Meara's earlier, arguably more general testimony on "furtive movement."

Most importantly, however, Jones did not suffer prejudice as a result of his attorney's alleged failure to object. There is not a reasonable probability that the trial's outcome would have differed had Jones' attorney objected earlier to O'Meara's "furtive movement" testimony. The strength of the State's evidence probably would have led to a conviction even in the absence of O'Meara's "furtive movement" testimony. In particular, O'Meara found a vial of methamphetamine under the driver's seat of a vehicle Jones was driving.

Similarly, Jones' attorney's failure to object to a portion of the State's closing argument was not objectively unreasonable and resulted in no prejudice even if it were. Jones argues that the State improperly interjected personal opinion into its closing argument and that Jones' trial counsel should have objected. The relevant portion of the prosecutor's closing argument states:

> Where's the only logical place that he could put [the methamphetamine]? Underneath the seat out of sight of the officer. That's the only place he could have put it. I'm certain the passenger doesn't want anything to do with that. And that's why it took him so long to stop.

2RP 85.

Lawyers do not commonly object during closing argument absent egregious misstatements. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004). A decision not to object during closing argument is within the wide range of permissible professional legal conduct. *Davis*, 152 Wn.2d at 717. And although it is improper for prosecutors to interject

their personal opinions into closing argument, they are permitted latitude to argue the facts in evidence and draw reasonable inferences from that evidence. *State v. Dhaliwal*, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003); *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

Here, it appears that the State did interject personal opinion into closing argument. But this opinion was not so flagrant that it would automatically elicit an objection. Further, Jones has not demonstrated either that the trial court would have sustained an objection to the State's improper statement or that his trial's outcome would have differed.

4. Unwitting Possession Instruction

Jones argues that his attorney's failure to propose an unwitting possession instruction amounted to ineffective assistance of counsel. Unwitting possession is an affirmative defense to an unlawful possession of a controlled substance charge. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). The unwitting possession defense ameliorates the harshness of a strict liability crime. *Bradshaw*, 152 Wn.2d at 538. To establish the defense, Jones must prove by a preponderance of the evidence that his possession of the methamphetamine was unwitting. *State v. Buford*, 93 Wn. App. 149, 152, 967 P.2d 548 (1998). Jones was entitled to an unwitting possession jury instruction if the evidence presented at trial was sufficient to permit a reasonable jury to find that he unwittingly possessed the methamphetamine. *Buford*, 93 Wn. App. at 153.

Here, Jones established at trial that the vehicle was not his and that there was a passenger in the vehicle when O'Meara initiated the traffic stop. Further, the State did not conduct a fingerprint analysis on the vial. But the evidence showed that the vial was found under Jones' driver's seat and O'Meara's testimony indicated a flurry of furtive movements before he stopped

the vehicle. A reasonable jury could infer from these facts alone that Jones knew the methamphetamine was in the vehicle and that he had control of the vehicle. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994) (constructive possession of controlled substance established when defendant has dominion or control over object or place where object was found); *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004) (exclusive control is not necessary to establish constructive possession); *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000) (dominion and control over vehicle where firearm found sufficient to establish constructive possession). Had the jury known that unwitting possession precludes a finding of guilt in a possession of a controlled substance charge, there is a possibility, but not a reasonable probability, that the trial's outcome may have been different. Jones' attorney's failure to propose an unwitting possession instruction did not amount to ineffective assistance of counsel.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, A.C.J.

We concur:

J. Bridgewater

J. Hunt